

in a particular case for a particular offence should not be dictated by some irrelevant consideration".

Article 121(1)

Finally, we come to the argument based on Article 121(1) which provides:

"(1) Subject to Clause (2) the judicial power of the Federation shall be vested in the [two] High Courts ...

and in such inferior courts as may be provided by federal law".

It was argued that the vesting of judicial power in the judiciary means that judges should have a discretion as regards appropriate sentences, that by prescribing a mandatory death sentence under the impugned section Parliament has deprived judges of that discretion, and that this is tantamount to the legislature usurping judicial power which has been entrusted by the constitution to the courts. In support Mr. Karpal Singh quoted this passage of the Privy Council in *Liyanage v. The Queen*⁽⁹⁾ an appeal from Ceylon, where the constitutionality of the penalty prescribed by the Criminal Law (Special Provisions) Act No. 1 of 1962, as amended by the Criminal Law Act No. 31 of 1962, was in question:

"Quite bluntly, their aim [i.e. that of the two Acts] was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences".

With respect, that case is distinguishable. The two Acts were enacted to deal with persons involved in a specific event, namely the abortive *coup d'état* of January 27, 1982, and were to cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the state committed on or about the date of the *coup* or from one year after the date of the commencement of the Act, whichever was later. The Acts were expressed to be retrospective allowed arrest without warrant for waging war against the Queen, and prescribed new minimum penalties for that offence and other offences and widened the scope of that offence. Here the I.S.A. is not expressed to be retrospective nor is it intended to apply to participants in a particular event.

As stated by Lord Diplock at page 72 in *Ong Ah Chuan v. Public Prosecutor*⁽⁸⁾ the Singapore case already referred to:

"There is nothing unusual in a capital sentence being

mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not. At common law all capital sentences were mandatory; under the Penal Code of Singapore the capital sentences for murder and for offences against the President's person still is".

Then His Lordship added the following significant words:

"If it were valid, the argument for the appellants [that a mandatory death sentence under the impugned section of the law in question there was unconstitutional] would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital – an extreme position which counsel was anxious to disclaim".

The foregoing are our reasons for answering the question posed in the negative.

Order accordingly.

Solicitors: *Ngeow & Co.*

PUBLIC PROSECUTOR v. TAN HOCK HAI

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Razak & Abdoolcader JJ.) November 1, 1982]

[Kuala Lumpur – Federal Court Criminal Appeal No. 32 of 1982]

Criminal Law and Procedure – Sentence – Offence of trafficking in heroin – Sentence of death should be imposed except in the most exceptional circumstances – Dangerous Drugs Act, 1952, s. 37(da).

Dangerous Drugs – Trafficking in heroin – Sentence – Death – Dangerous Drugs Act, 1952, s. 37(da).

In this case the respondent had been convicted for trafficking in some 736.5 grammes of heroin. The learned trial judge imposed a term of imprisonment for life with whipping of 10 strokes. The Public Prosecutor appealed against the sentence.

Held: (1) the sentence of death should be imposed for trafficking in drugs other than in the most exceptional circumstances;

(2) there were no extenuating circumstances in this case that would justify a classification of the case as most exceptional and there was no justification for the sentence of life imprisonment imposed. The respondent should be sentenced to death.

Cases referred to:

- (1) *Loh Hock Seng & Anor. v. Public Prosecutor* [1980] 2 M.L.J. 13.
- (2) *Public Prosecutor v. Oo Leng Swee & Ors.* [1981] 1 M.L.J. 247.
- (3) *Chang Liang Sang & Ors. v. Public Prosecutor* [1982] 2 M.L.J. 231.

FEDERAL COURT.

Shaikh Daud bin Haji Mohamed Ismail (Deputy

Public Prosecutor) for the appellant.
W.P. Leong for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The learned judge in this case did not sentence the appellant to death on conviction but imposed a term of imprisonment for life with whipping of 10 strokes. The Public Prosecutor appeals against the sentence and submits that the sentence of death should be imposed in consonance with the earlier decisions of this court on the question of sentence for trafficking in dangerous drugs.

The respondent was charged and convicted for trafficking in some 736.5 grammes of heroin, a sizeable quantity particularly if it is borne in mind that the presumption of trafficking under section 37(da) of the Dangerous Drugs Act, 1952 arises in the case of possession of 100 grammes of the drug. We have made clear the position with regard to sentencing on conviction for trafficking in dangerous drugs. We have said, and we say again, that the sentence of death should be imposed for trafficking in dangerous drugs other than in the most exceptional circumstances. We trust that it will not be necessary to repeat in the future our observations in this matter in *Loh Hock Seng & Anor. v. Public Prosecutor*⁽¹⁾; *Public Prosecutor v. Oo Leng Swee & Ors.*⁽²⁾ and *Chang Liang Sang & Ors. v. Public Prosecutor*⁽³⁾ in perhaps even more trenchant terms or at all.

We have been referred to the case of Beatrice Saubin, a twenty-two year old French girl who was convicted for trafficking in heroin and sentenced to death by the High Court which on appeal to this court was altered to imprisonment for life on the grounds that there were extenuating circumstances in that case. As no reasons have been given, either oral or written, in that case we do not know what the extenuating circumstances found were and we can therefore only consider that case as one on its own particular facts and circumstances. We would however make it absolutely clear that a twenty-two year old foreign female courier who trafficks in heroin takes the same risk and does so at the same peril as a fifty-two year old local male counterpart, and the sex, age and origin of the offender would appropriately be more a matter for consideration in any application for clemency to the appropriate authority under Article 42 of the Federal Constitution.

In the case before us the respondent was

A convicted for trafficking in a large amount of heroin for a monetary motive and out of sheer greed. We find no extenuating circumstances that would justify a classification of this case as most exceptional and we therefore find no justification for the sentence of life imprisonment imposed.

B We accordingly allow the appeal by the Public Prosecutor against the sentence, set aside the imposition of the term of imprisonment for life and the order for whipping and sentence the respondent to death.

C *Order accordingly.*

Solicitors: W.P. Leong & Partners.

**D SYARIKAT SERI BERLIAN SDN. BHD. v.
PIANG HONG YON & ORS.**

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Yusoff Mohamed J.) March 7 & November 6, 1982]

E [Johore Bahru — Federal Court Civil Appeals
Nos. 71/80 and 140-144/80]

Practice & Procedure — Appeal to Yang di-Pertuan Agong — Application for enlargement of time for appeal — No adequate reason for delay — Rules of the Federal Court, 1980, r. 154 — Courts of Judicature Act, 1964, s. 75.

F In this case the appellants applied for conditional leave to appeal to the Yang di-Pertuan Agong. They applied for enlargement of time under rule 154 of the Federal Court Rules, 1980. It was alleged that the delay was caused by difficulty in getting a director to swear an affidavit.

G **Held:** the reason given for the delay was a most inadequate one and the application for extension of time must be refused.

Cases referred to:

(1) *Re L.Y. Swee & Co. Ltd., Khoo Leong Kee v. L.Y. Swee & Co. Ltd.* [1968] 2 M.L.J. 104.

H (2) *Ratnam v. Cumasamany & Anor.* [1965] 1 M.L.J. 228.

FEDERAL COURT.

Thara Singh Sidhu for the applicants.

Humphrey Ball for first six respondents.

Edgar Joseph Jr. for the 7th respondent.

I *Cur. Adv. Vult.*

Wan Suleiman F.J. (delivering the judgment of the Court): This is an application for conditional leave to appeal to His Majesty the Yang di-Pertuan Agong against the order of this court dated December 5, 1981, and for a further order that